Supreme Court, U.S.
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No. 16A1190

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) The parent corporation of respondent International Refugee Assistance Project is the Urban Justice Center, Inc.

2) Respondents HIAS, Inc., and Middle East Studies Association of North America, Inc., do not have parent corporations.

3) No publicly held company owns ten percent or more of the stock of any respondent.

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INTRODUCTION

The government asks this Court, without full briefing and argument, without any concrete assertion of irreparable injury, and despite its own significant delay, to allow it to immediately implement the 90-day entry ban set forth in Section 2(c) of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) ("March Order"). That would dramatically upend the status quo. Section 2(c) has never been operative, and both the en banc court of appeals and the district court concluded that the President's ban violates the cherished values of religious neutrality "rooted in the foundation soil of our Nation." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). Moreover, the ban's predecessor unleashed widespread chaos and caused substantial harm to individuals, institutions, states, and municipalities in the brief period that it was in effect before being enjoined by the courts and abandoned by the government.

The Court should deny the application for a stay. First, a stay would serve no practical purpose because, under the plain terms of the Order, the ban expires on a date certain: June 14, 2017. A stay from this Court would thus not stop Section 2(c)'s ban from running out on its own terms two days from the filing of this brief.

Second, even if the ban did not expire on June 14, the application should still be denied because granting a stay would allow the government to effectuate the *entire* 90-day ban before this Court resumes oral arguments next Term. Entering a stay would therefore hand the government a complete victory in practical terms

without full merits consideration from this Court, even though the courts below and the district court in *Hawai`i* found that the ban was likely unconstitutional.

Granting a stay would thus accomplish the *reverse* of a stay's proper purpose: providing *interim* relief to allow for considered review. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (explaining that one purpose of the stay mechanism is to *avoid* "justice on the fly"); *Nat'l Socialist Party of Am. v. Village of Skokie*, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers) (denying application for stay that "would be tantamount to a decision on the merits in favor of the applicants").

Third, the government has not established that the "extraordinary" relief of a stay is warranted. It has not demonstrated *any* need to implement the ban *now* (nearly four months after the original ban was enjoined) rather than after this Court can give the case full consideration. In fact, the government *delayed* issuance of the current Order for weeks, C.A. App. 537-538, asked for briefing schedules that ensured Section 2(c) would remain enjoined for additional weeks at a time, *see* Gov't Corr. Mot. to Expedite Appeal, Doc. 14, at 7 (4th Cir. filed May 22, 2017); Gov't Mot. to Expedite Consideration, Doc. 12, at 7-8 (9th Cir. filed May 31, 2017), and for months declined to seek a stay from this Court. The government's conduct belies the suggestion that it needs the ban immediately.

Moreover, the injunction of Section 2(c) does not prevent the government from changing vetting procedures or other policies relating to travel and entry. Indeed, in recent months the government has prescribed heightened screening and questioning for visa applicants; instituted mandatory review of social

media accounts for certain visa applicants; issued a "laptop ban" on flights from certain countries; and continued to exercise its statutory authority to deny visas or entry in individual cases, without raising any question of its compliance with this injunction. In the course of addressing the ban and the injunctions, the President himself recently wrote that "[i]n any event we are EXTREME VETTING people coming into the U.S."[1]

It is therefore unsurprising that the government's claim of irreparable injury rests on conclusory assertions of injury to abstract institutional interests rather than actual or potential concrete harms. In essence, the government argues that it is always irreparably injured when a court enjoins executive action—and, therefore, that it automatically satisfies this requirement of the stay standard. That is incorrect. Eventual victory on the merits would cure any institutional injury. And the government has made no showing whatsoever that its asserted injury would worsen absent a stay.

By contrast, staying the injunction, and reviving the ban's official condemnation of a religion, would cause immediate and widespread harm to the plaintiffs and others like them. The ban would prolong individuals' painful separation from their loved ones, imposing daily the hardships of distance and uncertainty. App. 32a. And allowing it to go forward would strike at our constitutional bedrock. The "clearest command of the Establishment Clause" is that the government may not single out a disfavored religion for condemnation. *Larson*

[1] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realdonaldtrump/status/871679061847879682.

v. Valente, 456 U.S. 228, 244 (1982). Yet, as the courts below concluded, that is just what the President's Order does, sending the unmistakable message to plaintiffs, including members and clients of the organizational plaintiffs across the country, "that they are outsiders, not full members of the political community." App. 25a (internal quotation and emphasis marks omitted); *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000). Resurrecting this ban would renew that message and would denigrate, isolate, and exclude plaintiffs and other Muslims from our national community.

Finally, allowing the ban to immediately go into effect would create enormous confusion, just as its predecessor did in January. The government already promises to implement the ban not according to its text but according to what "make[s] sense." Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2-3 (4th Cir. filed May 5, 2017). But what does that mean? Would it "make sense" to apply the ban to those who had been approved for visas before a stay issued, but had not yet received their visas? March Order § 3(a)(iii). To those who were in the United States on the original effective date but not when a stay is granted? *Id.* § 3(a)(i). To those who were previously admitted to the country after March 16 but before a stay is granted? *Id.* § 3(b)(ii). The potential for "confusion and disruption" is clear, *Graddick v. Newman*, 453 U.S. 928, 936 (1981) (Powell, J.), particularly in light of the government's "shifting interpretations" of its January ban order. *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (per curiam).

This Court should decline the government's invitation to plunge us back into such uncertainty. The Fourth Circuit's decision vindicates the plaintiffs' rights, our deeply-held constitutional values, and the duties of an independent judiciary. And it maintains the status quo. No stay is warranted.

STATEMENT

Before and after his inauguration, the President's continually updated website called for "preventing Muslim immigration" and "a total and complete shutdown of Muslims entering the United States." App. 10a & n.5. As a candidate, Mr. Trump declared that "Islam hates us" and said that "we're having problems with Muslims coming into the country. App. 11a. He reiterated his demand for a ban of Muslims on multiple occasions. App. 11a.

After the election, President-elect Trump was asked whether he still planned to implement some form of a Muslim ban. He responded, "You know my plans. All along, I've proven to be right. 100% correct." App. 49a; *see also* App. 10a-11a, 48a-49a (reviewing multiple previous statements). By then, he had repeatedly announced that he would achieve his Muslim ban by banning individuals from Muslim countries rather than using an explicit religious test. He explained that "[p]eople were so upset when I used the word Muslim," and so he would now be "talking territory instead of Muslim." App. 12a (stating that constitutional equal treatment is "great" but "I view it differently"); *see also* App. 49a-50a.

i. The January Order

As the court of appeals observed, seven days after the President took office, he issued an Order that "appeared to take this exact form." App. 50a; *see* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, § 3(c), 82 Fed. Reg. 8977 (Feb. 1, 2017) ("January Order"). The January Order banned, for 90 days, entry into the United States by nationals of seven countries. The breadth of this Order was unprecedented. *See* App. 254a. The countries banned in the January Order range from 90 to 99 percent Muslim, and the Order provided for the possibility of an indefinite ban on those or other countries after the initial 90-day period. January Order §§ 3(e)-(f). The Order referenced "'honor' killings," *id.* §§ 1, 10(a)(iii), which, as the Fourth Circuit observed, is a "well-worn tactic for stigmatizing and demeaning Islam." App. 53a n.17; App. 137a-138a & nn.7-8 (Thacker, J., concurring). And it provided preferential treatment for religious minorities, a preference that the President himself explained was designed to give Christian refugees priority over Muslims. January Order § 5(b); App. 13a, 132a-133a (Thacker, J., concurring).

At the signing ceremony, President Trump read the title aloud and then said, "We all know what that means." App. 13a; C.A. App. 403, 778. The following day, when asked how the President had decided to ban the seven designated countries, a Presidential advisor explained that President Trump had approached him to help design a Muslim ban "legally," and his recommendation was that it operate on the basis of nationality. App. 13a; C.A. App. 508-509.

The President issued the January Order "without consulting the relevant national security agencies." App. 53a-54a; *see* App. 213a; C.A. App. 725-726, 804; *see also* App. 131a-132a (Thacker, J., concurring) ("the President actively shielded" the acting Attorney General "from learning the contents" of the Order); C.A. App. 531-534. Former national security officials aware of intelligence as of a week before the Order was signed submitted sworn evidence that "[t]here is no national security purpose for a total ban on entry for aliens from the [designated countries]." App. 9a (quoting C.A. App. 91); *see* App. 54a.

The January Order went into immediate effect and caused widespread chaos. *See, e.g.*, C.A. App. 207, 389-395, 531-534, 583-586. Lawful permanent residents, individuals with valid visas, and refugees were detained at airports and threatened with removal; families were separated; patients were blocked from medical treatment; and people were stranded in harm's way. Many individuals were prevented from getting on planes to come to the United States; others who had made it here were forced or persuaded to leave without being admitted. The government supplied confusing and contradictory interpretations of the scope of the January Order's ban during the short time that it was in effect. *Washington*, 847 F.3d at 1166.

Multiple legal challenges ensued, and several courts enjoined aspects of the ban. After the Ninth Circuit declined to stay a nationwide injunction of the Order's ban provisions, *id.* at 1164-69, the government announced that it would issue a revised Executive Order to replace the January Order.

The reason proffered for the 90-day period was "[t]o temporarily reduce investigative burdens" while the Secretary of Homeland Security reviewed vetting for the seven countries. January Order §§ 3(a), (c). In particular, the Secretary was directed to "immediately" conduct that review and submit a report within 30 days. *Id.* §§ 3(a), (b). These provisions were never enjoined and remained in force for 48 days until the March Order took effect, but the government did not complete the report required by the January Order. *See* 4th Cir. Oral Arg. at 7:55-8:55.[2]

ii. The March Order

The government took three weeks after the Ninth Circuit's *Washington* decision to draft a replacement Executive Order, and reportedly deferred its release to maximize positive press coverage of an unrelated presidential speech. C.A. App. 537-538.

The President issued the revised Order on March 6, 2017. The revised Order is, in most relevant respects, identical to the January Order, including its title; its list of banned countries (with the exception of Iraq), § 2(c);[3] provision for a possible indefinite ban after the initial ban period expires, § 2(e); various provisions related to refugees, § 6; a discretionary waiver provision, § 3(c); and the reference to "honor killings," § 11(a)(iii). *See* App. 50a-51a. The 90-day, six-country ban appears in Section 2(c) of the revised Order. Section 3 of the Order exempts various categories

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[2] *Available at* http://www.uscourts.gov/courts/ca4/17-1351-20170508.mp3.

[3] The banned countries are Iran, Libya, Syria, Somalia, Sudan, and Yemen.

of people from the Section 2(c) ban, including individuals who have valid visas or other travel permission as of the Order's effective date.

Although the assessment and reporting provisions of the January Order were not enjoined and had already been in effect for 48 days, the March Order restarted the 90-day ban period and 30-day assessment without explanation. *See* March Order § 2. By the express terms of the March Order, the ban will expire on June 14, 2017—90 days after the Order's effective date. *Id.* § 2(c). The effective date provision governs all parts of the Order, and has never been enjoined. *Id.* § 14.

The Order pointed generally to security concerns about individuals born abroad. *Id.* §§ 1(h)-(i). It cited only two examples, however, in imposing a ban on some 180 million people, and neither example demonstrates a vetting problem with respect to any of the banned countries. The first involved two Iraqi nationals, which, because Iraq was excepted from the March Order, "does not support *this* ban at all." App. 134a (Thacker, J., concurring). The second concerned a Somali national who was brought to the United States when he was two years old and committed an offense seventeen years later. App. 134a-135a (Thacker, J., concurring); C.A. App. 547-548.

Shortly before the President signed the revised Order, two internal Department of Homeland Security ("DHS") reports became public. One report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." C.A. App. 419. The other concluded that increased vetting of visa applicants was unlikely to significantly reduce the incidence of

terrorism in the United States, because the vast majority of foreign-born extremists radicalized years after immigrating. C.A. App. 423, 426; *see* App. 9a, 54a; *see also* App. 9a (noting declaration from former national security officials that there is "no national security purpose" for the Order's blanket ban).

The President recently characterized the revised Order as a "watered down, politically correct version [the Justice Department] submitted to the S[upreme] C[ourt]" and asserted that the Department "should have stayed with the original Travel Ban."[4] The President also called for a "much tougher version."[5] Other White House officials have likewise underlined the common purpose of the two Orders. The White House Press Secretary affirmed that "[t]he principles of the executive order remain the same," and a senior advisor to the President echoed that the revised Order contains "mostly minor technical differences" and achieves "the same basic policy outcome for the country." App. 14a.

iii. The Plaintiffs

The plaintiffs in this case are individuals and organizations who are directly affected by the March Order. The individual Muslim plaintiffs are U.S. citizens and lawful permanent residents seeking to reunite with family members who are

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[4] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128; *see also* App. 14a, 51a (noting previous time the President characterized the revised version as a "watered down" version of the original).

[5] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871677472202477568; *see also* Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017), https://www.facebook.com/DonaldTrump/videos/10159253902870725/.

nationals of banned countries. They have experienced isolation, exclusion, fear, anxiety, and insecurity because of the "anti-Muslim attitudes" conveyed by the Executive Order. C.A. App. 306, 310, 786.

The individual plaintiffs' pending visa petitions are directly affected by the ban.[6] Plaintiff John Doe #1, for example, is a Muslim lawful permanent resident from Iran with a pending petition for a visa to be reunited with his Iranian wife. C.A. App. 304-305. Other individual plaintiffs with relatives from the banned countries face similar harm. *See* C.A. App. 321-322 (Plaintiff Ibrahim Mohomed); C.A. App. 316-319 (Plaintiff Jane Doe #2).

The ban also harms Muslim clients of organizational plaintiffs International Refugee Assistance Project ("IRAP") and HIAS. IRAP provides legal representation to vulnerable populations, particularly those from the Middle East, who are seeking safety and reunification with their family members in the United States. C.A. App. 263. Plaintiff HIAS is the oldest refugee assistance organization in the world. C.A. App. 272. Both IRAP and HIAS, which serve both refugees and non-refugees, have Muslim clients in the United States who are seeking to be reunited with loved ones from the six banned countries. C.A. App. 263, 273, 283. The Order has left their Muslim clients feeling marginalized, isolated, and afraid. C.A. App. 269-270, 285-287. Both organizations have also suffered direct organizational harms because of the Executive Orders. C.A. App. 267, 280-281.

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[6] John Doe #3's wife and Paul Harrison's fiancé have been issued visas and admitted to the United States since this suit was filed.

Plaintiff Middle East Studies Association ("MESA") is a U.S.-based membership organization of students and scholars of Middle Eastern studies. C.A. App. 297-298. Muslim members similarly feel "marginalize[d]" and "fear that they will be singled out" because of the Order's "anti-Muslim message." C.A. App. 300. Among other things, the ban, if implemented, would seriously "reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees." App. 17a; *see* C.A. App. 300-303. The ban also harms MESA's U.S.-based members who seek to collaborate in the United States with individuals from the banned countries. C.A. App. 298-300.

iv. Decisions Below

On March 16, the district court issued a nationwide preliminary injunction of Section 2(c) of the Order. Looking to evidence from "before [the] election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order," App. 241a, the court held that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim. A ten-member majority of the en banc court of appeals agreed that the preliminary injunction should be affirmed in substantial part[7] and that the Order likely violates the Establishment Clause. Seven judges joined the majority opinion in full, and two more concurred nearly in full. A tenth judge concurred in the judgment, also agreeing that Section 2(c) likely violates the Establishment Clause. Three judges dissented.

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[7] The court vacated the portion of the district court's order that directly enjoined the President himself. App. 73a-74a.

The majority first concluded that *at least* Plaintiff Doe #1 had standing to assert the Establishment Clause claim. App. 33a-34a. Doe #1, the court explained, would be subjected to "the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." App. 32a. Having concluded that "at least one Plaintiff possesses standing," the majority did not "need [to] decide whether the other individual plaintiffs or the organizational plaintiffs have standing with respect to this claim." App. 34a; *contra* Pet. 15 n.7; App. Stay 24 n.8 (implying that the court concluded other plaintiffs lacked standing). The court likewise rejected the government's other justiciability arguments, observing that this Court "has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake." App. 34a-36a.

On the merits, the court applied the standard articulated in *Kleindienst v. Mandel*: A court will accept the government's proffered justification if it is "facially legitimate and bona fide." 408 U.S. 753, 770 (1972); *see* App. 38a-39a. Relying on Justice Kennedy's controlling concurrence (joined by Justice Alito) in *Kerry v. Din*, the court explained that "where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." App. 42a (quoting 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment)).

The court held that the plaintiffs had made a "substantial and affirmative showing" that the government's proffered justification was not bona fide. App. 43a-44a, 46a. The court relied on the "ample evidence" that the March Order was an effort to effectuate the promised Muslim ban, and "the comparably weak evidence" to the contrary. App. 44a. Having concluded that the Order failed *Mandel*'s threshold "bona fide" analysis, the court next examined it under the Establishment Clause. App. 45a-46a. Based on the "compelling" record in this case, the court of appeals concluded that the Order violated longstanding Establishment Clause principles. App. 48a-52a.

The court emphasized the narrowness of its holding: "[I]n this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the March Order.]" App. 61a-62a; *see also* App. 252a (district court explaining that this is a "highly unique case").

Three judges wrote opinions agreeing with the majority's Establishment Clause holding and further concluding that the Order is unlawful in various respects under the Immigration and Nationality Act ("INA"). *See* App. 94a-100a (Wynn, J., concurring) (INA analysis applying the canon of constitutional avoidance); App. 85a, 76a n.2 (Keenan, J., concurring in part and concurring in the judgment) (finding that the Order violates the INA and is not "facially legitimate"); App. 127a-145a (Thacker, J., concurring) (concluding that the Order likely violates

the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A), and that it fails constitutional scrutiny even looking only to post-inauguration evidence, App. 130a-131a, 138a).

v. **Previous Stay Proceedings**

Both the January and March Orders resulted in injunctions and subsequent stay litigation. In litigation regarding the January Order, the government initially moved quickly to reinstate its ban. The day after the district court in *Washington* issued a temporary restraining order ("TRO"), the government filed a notice of appeal, motion to stay, and motion for an emergency administrative stay in the Ninth Circuit. The court of appeals issued its written decision denying the stay five days later. *Washington*, 847 F.3d at 1158. The government did not seek a stay or review in this Court, and announced that it would instead issue a revised Order.

It proceeded at a different pace in litigation regarding the March Order. In the instant case, the district court ruled on March 16. The government moved for a stay in the Fourth Circuit on March 24, and requested and received a schedule on the stay motion that ran through April 5. The Fourth Circuit held the stay motion for the merits, denying it as moot on May 25.

In the parallel *Hawai'i* case addressing the March Order, No. 16A1191, the district court for the District of Hawai'i issued a TRO against Sections 2 and 6 of the revised Order on March 15. *Hawai'i v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). The government then stipulated to extend the TRO by two weeks and litigated further in the district court. The district court

converted the TRO to a preliminary injunction on March 29. *Hawai'i v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). The government appealed the Hawai'i preliminary injunction, and requested and received a four-week briefing schedule for its Ninth Circuit stay motion; the motion was fully briefed on April 28. A Ninth Circuit panel heard oral argument on May 15.

On June 12, 2017, the Ninth Circuit affirmed the district court's preliminary injunction of the bans in Sections 2(c) and 6(a) of the Order. The Ninth Circuit vacated the portion of the injunction, however, that had enjoined the internal review and reporting provisions in Sections 2 and 6. Therefore, Section 2's 90-day review process should be complete by the beginning of the Court's next Term, vitiating any asserted need for the Section 2(c) ban.

Other provisions of the March Order, including Sections 4, 5, and 9 relating to vetting procedures, have never been enjoined.

ARGUMENT

The government bears a "heavy burden" in justifying the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers); *see Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).[8] The government has not sustained that heavy burden. First, there is

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[8] The government did not request a stay pending certiorari from the Fourth Circuit before applying to this Court for a stay, notwithstanding Rule 23.3, because it believes that doing so "would be futile." App. Stay at 4 n.1. Rule 23.3 does not excuse a party from its obligation to first apply to the lower court for a stay on the ground of futility except "in the most extraordinary circumstances." The government has not established "extraordinary circumstances" that would justify bypassing the court of appeals, and on that ground alone the stay should be denied.

no point in granting the government's application because the ban period, properly interpreted, has all but expired. Second, even if that were not so, the application should be denied because granting a stay would accomplish the *reverse* of a stay's proper purpose, which is to allow considered review of the applicant's claims. *Nken*, 556 U.S. at 427; *see Nat'l Socialist*, 434 U.S. at 1328.

Further, even if the government could get over those hurdles, it would still have to show:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; *and* (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (emphasis added). "An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers); *see also Nken*, 556 U.S. at 438-39.

The government has not shown irreparable injury here, and the application can be denied for that reason alone. In addition, as both courts below concluded, the balance of the equities tips sharply against the government. Finally, as plaintiffs explain further in their simultaneously filed brief in opposition to the

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At a minimum, the Court should treat this application as if it had been denied below, and thus subject to a presumption that it should be denied here. *See Whalen*, 423 U.S. at 1316; *Rostker*, 448 U.S. at 1308.

petition for certiorari, the Court should not grant the government's certiorari petition, and in any event the court of appeals' decision is correct.

I. A STAY IS NOT WARRANTED BECAUSE THE BAN WILL EXPIRE THIS WEEK.

Under the clear terms of the March Order, a stay is pointless and therefore inappropriate. Section 2(c) expires on June 14—two days after this opposition is filed. *See* March Order § 2(c) (banning entry "for 90 days from the effective date of this order"); *id.* § 14 (defining the effective date as March 16, 2017); *see also* Opp'n Cert. 13-15 (explaining that certiorari should be denied on this basis).

Notably, the government has previously recognized the ban's clear temporal limit, explaining to the court of appeals in its stay motion that "Section 2(c)'s 90-day suspension expires in early June." Gov't Stay Mot., Doc. 35, at 11 (4th Cir. filed Mar. 24, 2017). However, shortly before oral argument in the court of appeals, the government reversed itself, without explanation. Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2-3 (4th Cir. filed May 5, 2017) (contending that the 90-day period will begin if and when the injunctions are lifted); *see also* Pls.' Reply to Resp. to Mot. to Supp. R., Doc. 292, at 1-2 (4th Cir. filed May 7, 2017) (plaintiffs explaining that view is wrong); Opp'n Cert. 13-15.

Despite the government's shifting views, the Order's effective date is explicit and unambiguous, as is Section 2(c)'s incorporation of that effective date into its text. There is no point in staying an injunction against an expired entry ban. *Cf. Graddick*, 453 U.S. at 936 (stay denied where the order had already been executed, so a stay would not benefit applicant).

II. A STAY IS NOT APPROPRIATE BECAUSE IT WOULD ALLOW THE GOVERNMENT TO IMPLEMENT THE ENTIRE SECTION 2(C) BAN BEFORE THE COURT CAN REVIEW THE MERITS.

If the government's recent reinterpretation of the effective date provision is accepted, and the 90-day ban clock does not begin to run until the injunction is lifted, the stay should still be denied, because granting it would effectively predetermine the merits of this case.

"A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken*, 556 U.S. at 421. Its purpose is to "allow[] an appellate court to act responsibly" by "bring[ing] considered judgment to bear on the matter before it" and *avoid* "justice on the fly." *Id.* at 427; *see, e.g., Boston v. Anderson*, 439 U.S. 1389, 1390 (1978) (Brennan, J., in chambers) ("[U]nless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views."). On the other hand, where staying the lower court's ruling "would be tantamount to a decision on the merits in favor of the applicants," the application should be denied. *Nat'l Socialist*, 434 U.S. at 1328; *see also, e.g., Cousins v. Wigoda*, 409 U.S. 1201, 1206 (1972).

That is what the government asks for here: a stay that short-circuits the merits stage of the case. The government asks the Court to stay the preliminary injunction now, grant certiorari, and hear argument on the merits early next Term, more than 90 days from now. The government would then be free to execute the full ban to its conclusion without this Court ruling on the merits (or receiving full

briefing or hearing argument), even though all four lower courts in this case and *Hawai`i* have found the ban invalid.

The government's application thus turns this Court's stay doctrine on its head. "The whole idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits." *Nken*, 556 U.S. at 432. Here, granting the government's application would *deprive* this Court of an opportunity to render a decision on the merits before the ban expires. Rather than allowing this Court to exercise its "considered judgment," the government is effectively asking the Court to grant it full relief "on the fly." *Nken*, 556 U.S. at 427. The application should therefore be denied.

III. THE GOVERNMENT HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

1. The government's own conduct in this and related cases "blunt[s] [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus*, 463 U.S. at 1318; *see also Graddick*, 453 U.S. at 936 (potential for "confusion and disruption" weighs "most heavily" where the stay applicant "has moved with unexplained tardiness"). Since the Ninth Circuit denied the government's request to stay the *Washington* injunction of the January Order on February 9, the government has failed to move with real or consistent urgency.

Indeed, the government has repeatedly delayed actions that could have moved the ban forward. As a result, some four months have elapsed since the original ban was enjoined. This delay undermines the government's contention that it needs to implement the ban now.

After informing the Ninth Circuit on February 16 that a new Order was "forthcoming," *see* Supp. Br. on En Banc Consideration, *Washington v. Trump*, No. 17-35105, Doc. 154, at 46 (9th Cir. filed Feb. 16, 2017), the government took three weeks to issue a replacement Executive Order. It is uncontested that part of that delay was to avoid distracting from press coverage of an unrelated speech by the President. C.A. App. 537-539. Thus, even without any further litigation, the Section 2(c) ban would have gone into effect forty-one days after the original ban was enjoined. That does not suggest an urgent need to impose a 90-day entry ban covering a particular time period.

Later developments underlined the government's lack of urgency. In this case, unlike in *Washington*, the government did not file an emergency request for a stay within 24 hours of the injunction, which would have set up a rapid stay decision. Rather, the government took over a week to file. And, in accordance with the timeline *the government* proposed to the Fourth Circuit, its stay motion was not fully briefed until two weeks later, on April 5. The court of appeals then did not act on the motion until May 25, seven weeks later. At no point did the government seek a stay before judgment from this Court.

And strikingly, in the *Hawai`i* litigation, the government did not immediately appeal the district court's TRO to the Ninth Circuit—even though it had just obtained immediate appellate review of the *Washington* TRO. Instead, the government agreed to remain before the district court for two more weeks. And when it finally went to the Ninth Circuit, it proposed a lengthy briefing schedule.

The eventual stay motion was not fully briefed until April 28—*84 days* after the January Order's ban was enjoined.

Finally, in the Ninth Circuit, as in the Fourth, it was quickly apparent that a decision on the stay application would not be issued soon. Yet the government did not seek a stay from this Court in either case until June 1—*118 days* after the *Washington* injunction. Thus, the cumulative and predictable effect of the government's decisions is that some four months have gone by with no ban in place. Despite that passage of time, the government has provided no evidence that it has been harmed by the injunctions. And even now, the government has sought to expedite only the threshold decision whether to grant certiorari, and not the merits itself should the stay application be denied.

Of course, the government can move much more quickly when it feels there is a genuine need. For example, in *Kiyemba v. Obama*, 555 F.3d 1022, 1024 n.2 (D.C. Cir. 2009), when the district court issued an injunction requiring the release of a detainee at Guantanamo Bay, the government moved for a stay the same day. In *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971), the government moved for a stay from the Second Circuit the same day that the district court issued its order. *See* Brief for Pet. at 9-10, *New York Times Co. v. United States*, No. 70-1873 (U.S. filed June 26, 1971), 1971 WL 134368. And in the litigation over the January Order, the government moved for a stay of the TRO issued in *Washington v. Trump* within 24 hours. 847 F.3d at 1158. The

suggestion that there is any urgent need to change the status quo and impose the 90-day ban *now* is belied by the government's own conduct.

2. The government does not actually assert any concrete or specific security-related need to proceed immediately with Section 2(c)'s 90-day ban. All it asserts is an abstract institutional injury that arises any time a policy is enjoined.

In fact, the record evidence all points in the opposite direction. The government's own intelligence analysts concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," C.A. App. 419, and that increased vetting of visa applicants was of limited value in preventing terrorism in the United States. C.A. App. 426; *see* App. 9a, 54a. Similarly, a bipartisan group of former national security officials, including individuals who had access to relevant nonpublic intelligence information through January 19, concluded that the Order "serves no persuasive national security or foreign policy purpose" and that it will actually "do long-term damage to our national security and foreign policy interests." Corrected Br. for Fmr. Nat'l Sec. Officials as Amici Curiae Supporting Appellees at 5-8, Doc. 126; *see* App. 54a.

Even the Order itself demonstrates that individuals from the banned countries do not present a categorical risk. By its express terms, the Order does not bar entry to nationals of the banned countries who were issued visas before March 16, *see* March Order § 3(b)(iii), even though the ban is ostensibly predicated on a concern that the government has insufficient information to assess whether such individuals pose a security risk. And the government has now taken the position

that if the injunction were stayed, those who obtained a visa *after* March 16, but before the stay, would also be allowed to enter the United States—even though, absent the injunctions, the Order would have prevented those same individuals from entering. *See* Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2-3.

And of course, the injunction of section 2(c) at issue here does not have any effect on the government's ability to take *other* actions relating to travel or entry. Indeed, since the injunction issued the government has taken a number of steps in this area without the injunction presenting an obstacle. *See generally* Amicus Br. of T.A. at 11-15.[9]

For example, the government has prescribed heightened screening requirements for visas and rigorous enforcement of existing grounds of inadmissibility,[10] and it is requiring significant additional information from visa applicants. *See* Department of State, Supplemental Questions for Visa Applicants.[11] And contrary to the government's invocation of a cloud of "uncertainty . . . over what action the President may take concerning Muslim-majority countries," App. Stay 22, it has also instituted new measures, apart from the Order,

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[9] *See also* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871679061847879682 ("In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe.").

[10] Memorandum from the President to the Sec'y of State, the Att'y Gen., and the Sec'y of Homeland Sec. (Mar. 6, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security.

[11] Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 20,956 (May 4, 2017).

directed at groups of Muslim-majority countries. It has imposed additional rules for all air passengers departing from ten airports in Muslim-majority countries and arriving in the United States.[12] And it has imposed additional review procedures on applicants who have been to a territory controlled by ISIS.[13] The injunction did not prevent the government from instituting these measures.

The injunction also does not interfere with the government's longstanding authority to deny a visa or entry to individual noncitizens based on a wide range of grounds of inadmissibility, including terrorism-related grounds. *See* 8 U.S.C. § 1182(a)(3)(B); App. 115a-116a (Wynn, J., concurring). Consular officers and border control officials retain their statutory authority to demand further information or deny visas or admissions in appropriate circumstances. 8 U.S.C. § 1201(g); 9 FAM 306.2-2(A)(a)(1); 8 C.F.R. § 235.1(f)(1). And the President retains authority to issue additional Executive Orders addressing screening, vetting, entry, and travel procedures.

3. In lieu of any claim of concrete harm, the government's sole, perfunctory claim of irreparable injury is that *any* time the executive is enjoined from effectuating its policy, it is irreparably injured. App. Stay. 33 (citing *Maryland*

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[12] DHS Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States, Dep't of Homeland Sec. (Mar. 21, 2017), *available at* https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports.

[13] See, e.g., Michael D. Shear, Trump Administration Orders Tougher Screening of Visa Applicants, N.Y. Times (Mar. 23, 2017), *available at* https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html.

v. King, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

But, unlike the government's argument in this case, neither *King* nor *New Motor Vehicle Board* based their findings of irreparable injury *solely* on the fact that a government policy was enjoined, but rather found that specific concrete harms would arise absent a stay. *See King*, 567 U.S. at 1301 (discussing "ongoing and concrete harm to Maryland's law enforcement and public safety interests"); *New Motor Vehicle Bd.*, 434 U.S. at 1351 (noting that, absent a stay, numerous dealerships would be sited without state review); Amicus Br. of T.A. at 6-7; *see generally Nken*, 566 U.S. at 433-36 (rejecting categorical presumption of irreparable injury). Moreover, here, the executive branch retains ample authority to regulate immigration, including to deny visas and entry to persons who are not clearly admissible. It is only barred from implementing a single directive that targets a particular religion for condemnation. *Cf.* U.S. Mem. in Opp. to Stay 55, *West Virginia v. EPA*, No. 15A773 (U.S. filed Feb. 2016) (characterizing *King* and *New Motor Vehicle Board* as cases "where the Court stayed a judicial decision that prevented a State from exercising its regulatory authority at all" and arguing that the stay applicants could "identify no decision" holding that merely "constrain[ing]" authority is sufficient).

In any event, even assuming that the federal executive suffers some abstract institutional injury when federal courts enjoin it from taking unconstitutional

actions, the government has not explained how that injury would be exacerbated absent a stay, particularly in light of the time that has already passed. "[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect [separation-of-powers] principles." *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Washington*, 847 F.3d at 1168 (observing the government "may yet pursue and vindicate its interests in the full course of this litigation").

IV. NO OTHER FACTOR SUPPORTS THE ISSUANCE OF A STAY.

1. As explained more fully in the plaintiffs' Brief in Opposition to the government's certiorari petition, the court of appeals correctly applied this Court's precedents to the extraordinary facts of this case. Opp'n Cert. 20-32. The record contains a mountain of publicly available evidence of the purpose of Section 2(c)—including statements from the President and his close aides before and after the election; indicia of anti-Muslim purpose in the text of both versions of the Order; the illogic of, and lack of factual support for, the proffered justification; and unrebutted evidence that the ban would not advance national security. *Id.* at 24-29. The government therefore cannot establish that it is likely to prevail on the merits.

The Fourth Circuit rightly rejected the government's various justiciability arguments, concluding that plaintiffs who are singled out, condemned, and harmed by the ban have standing to challenge it. App. 22a-36a. It applied *Mandel* but concluded that the "ample evidence" in this case was enough to show the facial justification was not "bona fide." App. 44a-45a. And, under the Establishment

Clause, it appropriately followed this Court's instruction and refused the government's entreaties to "turn a blind eye to the context in which [the Order] arose." *Santa Fe*, 530 U.S. at 315; *see* App. 64a ("The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action.").

As the court explained, its holding was narrow but ultimately compelled by the remarkable record: "[I]n this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the March Order.]" App. 61a-62a. Indeed, it concluded, the President's ban "would likely fail *any* purpose test." App. 65a n.22 (emphasis added).

Accordingly, the government cannot demonstrate that it is likely to prevail on the merits. The court of appeals correctly applied this Court's precedents to the singular facts of this case. Its careful analysis does not warrant this Court's review, much less the issuance of a stay that would grant the government full relief without briefing or argument on the merits.

2. The courts below carefully weighed the parties' interests and correctly concluded that the balance of harms, along with the public interest, tips sharply in the plaintiffs' favor. App. 65a-71a; 256a-258a. Section 2(c), understood in the full relevant and probative context, sends an unequivocal message "emanat[ing] from the highest elected office in the nation." App. 31a. This message from the federal

government condemning plaintiffs' religion and their identity tells plaintiffs in unambiguous terms "that they are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (internal quotation marks omitted). It demeans them, attacks them, and leaves them feeling isolated, disparaged, unsafe, unwelcome, and excluded from our national community. *See* App. 16a, 26a, 31a. The same is true for many of the organizational plaintiffs' clients and members, spread out all across the country. C.A. App. 269-270, 300. The injury imposed by a reinstituted ban would be severe and irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

A reinstituted ban would also upend the plaintiffs' plans and prolong their separation from their families. App. 32a. Plaintiff Doe #1, for example, has been exposed to "fear, anxiety, and insecurity" and would be put in the position of choosing between his work as a scientist in the United States and "being with [his] wife" in Iran. App. 25a-26a. Those whose visas are denied during the ban "would have to restart *from the beginning* the lengthy visa application process." App. 28a.

Moreover, allowing the ban to take effect now would create confusion and disruption. The scope of the ban would once again be subject to on-the-fly determinations by governmental officials about what "make[s] sense." Gov't Resp. to Mot. to Supp. R., Doc. 291, at 2 (4th Cir. filed May 5, 2017). *See supra* at 4. The promise of confusion and uncertainty weighs heavily against granting the stay.

A partial stay would impose these same harms, and would also short-circuit the merits. Granting the government's alternative request to dramatically narrow

the injunction at this stage would give the government a near-complete victory, allowing it to implement the ban before the Court can consider the merits.

An injunction limited to individuals would also leave multiple plaintiffs unprotected from the harm of the Order. As the Court has explained, a "systemwide impact" warrants a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359 (1996) (citation omitted). A narrowed injunction would force Muslim plaintiffs and other Muslims throughout the United States to endure the ban's message of religious condemnation. The full injunction is likewise necessary to protect the organizational plaintiffs, who have clients and members across the country.[14] For instance, during the chaos of the January Order, plaintiff IRAP responded to more than 800 emergency queries and developed guidance for its network of more than 2,000 pro bono attorneys and law students nationwide. C.A. App. 264-265. A partially reinstated ban would impose comparable burdens.

CONCLUSION

The government's application for a stay asks this Court to grant extraordinary relief without any showing of concrete need. Granting it would impose grave harms on the plaintiffs, subject the nation to a policy that the lower

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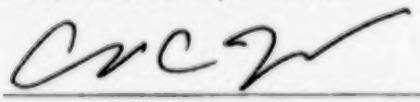
[14] The circumstances in *U.S. Department of Defense v. Meinhold*, 510 U.S. 939 (1993), were completely different. No time-limited policy was at issue in that case, and the stay therefore did not pretermit the merits. Nor did the case involve Establishment Clause harm. Instead, it was brought by a single plaintiff for whom the harm could be redressed by individual relief. Here, by contrast, a more limited injunction would neither relieve plaintiffs' nationwide harms nor address the religious condemnation they would experience. *Cf. Catholic League*, 624 F.3d at 1048.

courts have found unconstitutional without merits review by this Court, and replace the status quo with disruption and uncertainty. The application should be denied.

Respectfully submitted,



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